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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 535

TRANSIT COMMISSION AND STATE OF NEW YORK, appellants

v.

THE UNITED STATES OF AMERICA, THE LONG ISLAND Railroad Company, the Pennsylvania Railroad Company, and the Interstate Commerce Commission

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted District Court (R. 564) is reported in 1 Fed. Supp. 595. The original report of the Commission, Division 4 (R. 15), is reported in 162 I. C. C. 218, and its report on further hearing, likewise by Division 4 (R. 37), in 180 I. C. C. 439.

JURISDICTION

The decree of the District Court was entered October 20, 1932. (R. 580.) Petition for appeal was filed November 9, 1932, and was allowed on the same day. (R. 583, 584.)

Jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C., Title 28, Sec. 47), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345).

QUESTIONS PRESENTED

(1) Whether the operation by one interstate carrier over the tracks of another, under a trackage agreement, may constitute the operation of a line of railroad by the former, or the extension of its line of railroad, within the meaning of Section 1 (18) of the Interstate Commerce Act, as amended.

(2) Whether the jurisdiction over extensions and operations granted to the Interstate Commerce Commission by Section 1 (18) is exclusive, and includes the power, previously governed by State law, to consider the reasonableness of the terms of the agreement between the carriers involved in so far as they affect the public.

(3) Whether, if the Commission's jurisdiction extends over operations under trackage rights, it has jurisdiction over an agreement entered into subsequent to the enactment of Section 1 (18) where operation over the tracks in question commenced,

under an agreement which has expired, prior to the enactment of this section.

STATUTE INVOLVED

Pertinent provisions of the Interstate Commerce Act, as amended, are printed in the Appendix *infra*, pp. 35–37.

STATEMENT

This is a direct appeal from a decree of a specially constituted district court denying motions for a preliminary injunction and dismissing the suits of appellants brought to set aside an order of the Interstate Commerce Commission. (R. 580, 584.) The order certifies that present and future public convenience and necessity require that the Long Island Railroad Company continue to operate, under trackage rights, over a portion of the railroad of the Pennsylvania Tunnel and Terminal Company, and share in the use of its terminal facilities, as provided in an agreement between the parties dated December 23, 1930. (R. 547.) The order was not to become effective unless the carriers agreed within a specified time to reduce the basic term of their agreement from 20 years to 5 years, and to make certain modifications in the manner of computing the rental. (R. 547–548.) The carriers accepted these conditions and modified their trackage agreement accordingly, filing a copy of the modified agreement dated March 10, 1932, with the Commission. (R. 551–562, 563–564, 576–577.) After appellants had filed identical petitions

in the court below under the Urgent Deficiencies Act of October 22, 1913, the two suits were consolidated. (R. 1, 53, 580.) The Interstate Commerce Commission intervened as a party defendant. (R. 10, 54.)

Appellants do not question the sufficiency of the evidence to support the Commission's order, but seek to have determined only whether the issuance of the order was within the authority granted to the Commission by Paragraph 18 of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920. The claim is that the carriers should have submitted their trackage agreement for approval to the Transit Commission, pursuant to State law, rather than to the Interstate Commerce Commission. The material facts are found in the findings of fact of the court below (R. 572–577) and in the two reports of the Interstate Commerce Commission by Division 4 (R. 15–36,[1] 37–46[1]).

The Pennsylvania Railroad Company owns all the capital stock of the Pennsylvania Tunnel and Terminal Company and practically all of the capital stock of the Long Island Railroad Company. (R. 573.) These companies will be hereinafter respectively referred to as the Pennsylvania, the Terminal Company, and the Long Island. The Pennsylvania and the Long Island are carriers

[1] The same reports are reprinted in the record at pages 334–356 and 537–546.

by railroad subject to the provisions of the Interstate Commerce Act. (R. 15–16.) The Pennsylvania operates the properties of the Terminal Company under a long-term lease pursuant to authority granted by the Interstate Commerce Commission in 1928. (R. 16; *Acquisition of Control by Pennsylvania Railroad,* 145 I. C. C. 283.) These properties consist of the Pennsylvania Station and yard, located in midtown Manhattan, of two single-track tunnels running westerly under the city and the Hudson River into New Jersey, of four single-track tunnels running in an easterly direction under the city and the East River, and of the Sunnyside Yard in the Borough of Queens. (R. 573.) The Long Island trains come from the east through the tunnels under the East River into Pennsylvania Station, load again and start back east. (R. 575.) Since a majority of the passengers are commuters, a number of trains remain in the Pennsylvania Station during the middle of the day. (*Ibid.*)

For the purpose of determining the relative use of the Terminal Company's facilities by the Long Island and the Pennsylvania, that portion of the facilities which is affected by the Long Island's operation is divided into three zones. (R. 20–21, 574.) Zone 1 includes the station proper and adjacent yards between Sixth and Tenth Avenues in Manhattan; Zone 2 comprises the four single-track tunnels extending under the East River, two of

which are used exclusively by the Long Island, and tracks connecting with the tracks of the Long Island in the Borough of Queens; Zone 3 embraces the Sunnyside Yard used mostly by the Pennsylvania for storing its cars. (*Ibid.*) The investment in each zone as of July 1, 1928, and the so-called wheelage ratios, representing the proportion of Long Island cars handled in each of the three zones in 1930 as compared with cars of the Pennsylvania, including those of certain other carriers using the same facilities, are shown as follows (R. 38–39, 42, 575):

Zone 1	$46, 896, 746	42. 08%
Zone 2	$32, 603, 521	60. 49%
Zone 3	$8, 623, 170	7. 65%

Certain of the Terminal Company's facilities, particularly two of the tunnels under the East River, and tracks, platforms, and a waiting room in the station, appear to have been specially provided for the use of the Long Island when the Pennsylvania Station was built in 1910. (R. 19, 21.) A trackage agreement entered into at that time between the Long Island and the Pennsylvania was approved by the predecessor of the appellant Transit Commission, as required by State law. (R. 573.) A modification of this agreement in 1912 and several increases in rental between then and 1922 were similarly approved by the Transit Commission or its predecessor. (R. 573–574.)

In 1923 the Transit Commission was asked to approve a further increase in the rental. (R. 574.)

At the same time the Long Island applied for authority to increase its commutation fares. (*Ibid.*) At that time the Long Island was paying as annual rental its proportionate share, on a wheelage basis, of the operating expenses and taxes (less revenue received for station privileges) on the jointly used facilities and the station building, and in addition a fixed sum of $300,000. (*Ibid.*) An agreement was proposed whereby the Long Island, in lieu of the $300,000 payment, would pay an amount equal to its proportionate share, on a wheelage basis, of interest at 4% on the investment in the jointly used facilities, including the entire station building. (*Ibid.*) The Transit Commission declined to approve this proposed agreement, the effect of which would have been to increase the annual rental by over $1,000,000. (*Ibid.*)

In 1925 the rejected agreement was modified to exclude the station building above the track level, valued at $15,000,000, from the investment base and to eliminate from the rental also the operating expenses and taxes pertaining thereto;[2] but the rate of interest was increased to 5%. (R. 23, 575–576.) This modified agreement was approved by the Transit Commission in July of that year, with the interest rate reduced to 4%, and this approval was made retroactive to July 1, 1923. (*Ibid.*) Shortly thereafter an application to increase the interest

[2] This was probably due to the contention of the Transit Commission that the Long Island made little use of the station building above the track level. (R. 29.)

rate to 6% was denied by the Transit Commission, but an extension of the agreement as previously approved was granted for one year from January 1, 1926. (R. 576.)

The number of passengers handled annually by the Long Island more than trebled between 1911, when it commenced to operate into Pennsylvania Station, and 1930. (R. 19.) Its earnings rose from a deficit of $510,221 in 1920 to a net income of $4,682,656 in 1928. (*Ibid.*) The rental paid by it to the Pennsylvania increased from $519,173 in 1911 to $1,812,024[3] in 1923 and to $2,835,151 in 1928. (R. 574, 577.)

In 1929 the carriers applied to the Interstate Commerce Commission for a certificate of public convenience and necessity under Section 1 (18) of the Interstate Commerce Act, as amended, authorizing the Long Island to continue to operate over the tracks of the Terminal Company, and for an order under Section 3 (4) of the Act requiring the Long Island to continue so to operate under terms embodied in an agreement between the Long Island and the Pennsylvania dated November 13, 1928. (R. 15–16, 576.) A hearing was held on this application at which the Transit Commission, the City of New York, and the Association of Long Island Commuters, Incorporated, intervened and were represented by counsel. (R. 15, 16.) The Interstate Commerce Commission, in a report by Division 4, held that Section 3 (4) was not appli-

[3] This figure is probably erroneous. In petitioner's Exhibit 6 (R. 139) the rental for 1923 is shown as $2,025,710.

cable to a voluntary arrangement between carriers, but that the Commission had jurisdiction under Section 1 (18). (R. 17–18.) The report states in part (R. 19):

> The power conferred upon us by the act is in the interest of protecting interstate commerce. The carriers here involved being engaged in interstate commerce, our jurisdiction is plenary. The case is brought to issue mainly because of the possibility of increased fares on the Long Island, but consideration of the questions of rental, degree of use, and the like which are now presented must be weighed entirely on the showing of fairness and reasonableness and should not be influenced by the contingency emphasized by the protestants. The Pennsylvania and the Long Island are entitled to equally fair treatment in the matter.

The Commission found that public convenience and necessity require the continued operation by the Long Island over the tracks of the Terminal Company, but that the terms of the proposed agreement between the carriers were not just and reasonable. An order was therefore entered (R. 36) denying that part of the application which was under Section 1 (18), without prejudice to the submission of a modified contract, and dismissing that part of the application requesting an order under Section 3 (4).

In December, 1930, the carriers renewed their application to the Interstate Commerce Commission under Section 1 (18) submitting a modified

agreement dated December 23, 1930, intended to remove the objections indicated by the Commission to the previous agreement. (R. 38, 576.) After further hearing, the Commission by Division 4 filed its second report on February 8, 1932 (R. 37–47), and issued the certificate previously described (*supra*, p. 3). This action of the Interstate Commerce Commission changed the existing arrangement between the carriers (which the Transit Commission had approved) in two particulars. (R. 39–45.) The rate of interest paid by the Long Island on its share of the investment in the jointly used facilities, other than the station building above track level, was increased from 4% to 5%. The Long Island by the new agreement assumed 20% of the operating expenses of the station building above the track level, that part of the station building having previously been wholly excluded in the computation of the rental.

The opinion of the court below (R. 564–572) holding that the petitions of appellants should be dismissed, stated that (R. 572):

> Jurisdiction was properly assumed by the Interstate Commerce Commission because the Long Island Railroad, when running its trains under the proposed trackage agreement (1) would be operating a "line of railroad" within the meaning of Section 1 (18); (2) would be undertaking the "extension of its line" and engaging "in transportation * * * by means of such extended line"; and (3) would be preventing an

abandonment, which might occur, if the railroads agreed to discontinue joint use of terminal facilities because of burdensome rulings of the State authorities.

SUMMARY OF ARGUMENT

I. The trackage agreement between the Long Island and the Pennsylvania gave the former the right to operate a line of railroad, and had the effect of extending its line of railroad, within the meaning of Section 1 (18). This Court has recognized in the past that the operation by one carrier over tracks used jointly with the owner falls within Section 1 (18) and requires the authority of the Interstate Commerce Commission. *Alabama & Vicksburg Railway Company* v. *Jackson & Eastern Railway Company*, 271 U. S. 244, 249–250; *Cleveland, Cincinnati, Chicago & St. Louis Railway Company* v. *United States*, 275 U. S. 404, 409–410.

Although the Interstate Commerce Commission was somewhat doubtful of its jurisdiction at the outset, it has uniformly held in numerous cases arising since early in 1925 that its jurisdiction under Section 1 (18) extends over operations under trackage rights. This uniform administrative construction over a period of 8 years is persuasive. Furthermore, consideration of the purposes of Section 1 (18), to preserve the financial resources and the earning capacities of interstate carriers, and to prevent wasteful competition, leaves little doubt that Congress intended the Commission to exercise jurisdiction over operations under track-

age rights. The power to regulate such operations is a necessary incident to the exercise by the Commission of its duty to maintain an adequate railway service. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company,* 257 U. S. 563, 585; *New England Divisions Case,* 261 U. S. 184, 189; *Texas & Pacific Railroad Company* v. *Gulf, Colorado & Santa Fe Railway Company,* 270 U. S. 266, 277.

II. The Interstate Commerce Commission has exclusive jurisdiction under Section 1 (18) to determine whether proposed extensions, operations, or abandonments by interstate carriers are in the public interest. *Colorado* v. *United States,* 271 U. S. 153; *Transit Commission* v. *United States,* 284 U. S. 360. Local as well as national interests are committed to its care. The Commission is not limited, in a proceeding under Section 1 (18), to determining whether there is a need for the particular transportation service involved, but it has broad powers to consider all aspects of the proposed undertaking, in so far as it may affect the carriers involved or other carriers or the public at large. Thus, where, as in the instant case, a trackage agreement is entered into by two carriers which are under a common control, it is within the province of the Commission to inquire into the terms of the agreement and to consider the reasonableness of the rental fixed therein. Under Section 1 (20) of the Act, no approval other than

that of the Interstate Commerce Commission is required.

III. Section 1 (18) is applicable to a trackage agreement entered into subsequent to its enactment, even though operation commenced, under an earlier agreement since expired, prior to its passage. By the enactment of the Transportation Act all matters relating to extensions, operations, or abandonments by interstate carriers, except those enumerated in Section 1 (22), were placed under the jurisdiction of the Interstate Commerce Commission, and State laws previously applicable have been superseded. The claim that a State has jurisdiction over a trackage agreement between two interstate carriers relating to the joint use of terminal facilities, entered into subsequent to the enactment of the Transportation Act, is inconsistent with the comprehensive control over interstate carriers conferred upon the Commission by that Act. *Alabama & Vicksburg Railway Company* v. *Jackson & Eastern Railway Company,* 271 U. S. 244, *supra.*

ARGUMENT

I

SECTION 1 (18) OF THE INTERSTATE COMMERCE ACT COVERS THE OPERATION OR EXTENSION OF A LINE UNDER TRACKAGE RIGHTS

Section 1 (18), introduced into the Interstate Commerce Act by the Transportation Act, 1920, provides (*infra,* p. 35):

> no carrier by railroad subject to this Act shall undertake *the extension of its line of*

> *railroad,* or the construction of a new line of railroad, or shall acquire or *operate any line of railroad,* or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad

without first obtaining a certificate of public convenience and necessity from the Interstate Commerce Commission, and that no carrier subject to the Act "shall abandon all or any portion of a line of railroad, or the operation thereof," without obtaining a similar certificate. Under Section 1 (20) (*infra,* pp. 36–37) any unauthorized construction, operation, or abandonment may be enjoined at the suit of an interested party.

The Long Island is subject to the provisions of Section 1 (18). *Transit Commission* v. *United States,* 284 U. S. 360. Appellants' principal contention in this case is that the language of Section 1 (18) is not sufficiently broad to include operation under trackage rights. They appear to contend (brief, pp. 23–25) that "operation" of a line of railroad refers to the control and management of the tracks, so that if one company operates its trains over tracks owned and managed by another, the latter, but not the former, is operating a line of railroad. They maintain (brief, p. 19) that a line may be extended within the meaning of Section 1 (18) only by the construction of additional tracks, thus excluding all extensions by lease of existing tracks. The Interstate Commerce Commission and

the court below were of the view that the trackage agreement between the Long Island and the Pennsylvania gave the former the right to operate a line of railroad, and had the effect of extending its line of railroad, within the meaning of Section 1 (18).

In at least two cases this Court, without expressly so holding, has recognized that the operation of its line by one carrier over tracks used jointly with the owner, is subject to the approval of the Interstate Commerce Commission under Section 1 (18). The Interstate Commerce Commission has similarly construed this section in numerous cases since 1924, and the propriety of that construction seems evident from the face of the statute, particularly when considered in the light of its broad purposes.

In *Alabama & Vicksburg Railway Company* v. *Jackson & Eastern Railway Company,* 271 U. S. 244, involving the question whether the Interstate Commerce Commission has exclusive jurisdiction over junctions between the main lines of interstate carriers, this Court held that although the Transportation Act did not in specific terms confer that jurisdiction, "it is clear that the comprehensive powers conferred extend" to junctions such as those there in question. The Court supported its conclusion, in part, by the close relationship which it said existed between junctions of railroad lines and the joint use of trackage, stating (p. 250):

> Moreover, the establishment of junctions between the main lines of independent car-

> riers is commonly connected with the establishment of through routes and the interchange of car services, and *is often but a step toward the joint use of tracks. Over all these matters the Commission has exclusive jurisdiction.* (Italics ours.)

The Court also stated (pp. 249, 250):

> The only limitation set by Transportation Act, 1920, upon the broad powers conferred upon the Commission over the construction, extension, and abandonment of the lines of carriers in interstate commerce, is that introduced as paragraph 22 of Section 1, which excludes from its jurisdiction "spur, industrial, team, switching or side tracks, located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."
>
> * * * * *
>
> In matters relating to the construction, equipment, adaptation and use of interstate railroad lines, with the exceptions specifically set forth in paragraph 22, Congress has vested in the Commission the authority to find the facts and thereon to exercise the necessary judgment.

In *Cleveland, Cincinnati, Chicago & St. Louis Railway Company* v. *United States,* 275 U. S. 404, the "Big Four" attacked an order of the Commission under Section 1 (9) of the Act requiring it to construct a switch connection with the side track

of a coal company which was already served by another carrier. It contended that the side track of the shipper would become an extension of its line into territory served by another carrier, thus requiring a certificate under Section 1 (18). This Court pointed out (p. 409) that Section 1 (18) does not apply to side tracks built by a shipper, and added:

> Furthermore the order gave the Big Four no trackage rights over the Coal Company's track.

The further contention was made that two other carriers, whose tracks the side track of the Coal Company crossed at grade, had an agreement with the Coal Company permitting them to connect their lines with and move their trains over, the side track, thus converting it into an extension of the lines of the other carriers. As to this contention, this Court said (pp. 409–410):

> The argument is that because of the possibilities of the use of the track by these other carriers, it is an extension within the meaning of paragraph 18. *Texas & Pacific Ry Co.* v. *Gulf, Colorado & Santa Fe Ry. Co., supra.* But no such connection has been made or attempted or threatened; and neither the Illinois Commerce Commission nor the Interstate Commerce Commission has authorized such connection or use. *If the track is used by the Illinois Central or the Southern Illinois in the manner described, paragraph 20 of Section 1 furnishes*

> *the appellant with an appropriate remedy. Texas & Pacific Ry Co. v. Gulf, Colorado & Santa Fe Ry Co., supra.* (Italics ours.)

See also *Cleveland, Cincinnati, Chicago & St. Louis Railway Company* v. *Illinois Commerce Commission*, 315 Ill. 461.

As previously stated, the Interstate Commerce Commission has uniformly held in numerous cases since early in 1925 that agreements providing for the operation of its trains by one carrier over the tracks of another are subject to its approval under Section 1 (18).[4] By emphasizing certain early decisions of the Commission, and minimizing the many cases decided since 1924, appellants' brief (pp. 33–39) fails to present fully the history of the administrative application of Section 1 (18) to

[4] Many of these cases are collected in a footnote in *Chicago & Alton Railroad Company* v. *Toledo, Peoria and Western Railroad Company*, 146 I. C. C. 171, 181, *infra*. In addition to the cases there cited, see *Operation of Line By Pearl River Valley Railroad Company*, 111 I. C. C. 580; *Abandonment of Line By Chicago, Rock Island & Pacific Railway Company*, 131 I. C. C. 421; *Operation Under Trackage Rights By Northern Pacific Railway Company*, 138 I.C.C. 405; *Control and Operation of Louisville & Jeffersonville Bridge & Railroad Company*, 145 I. C. C. 131; *Operation of Lines By Louisiana & Arkansas Railway Company*, 145 I. C. C. 228; *Operation of Subway Railroad By New York State Railways*, 145 I. C. C. 269; *Operation of Line By Oregon Short Line Railroad Company*, 150 I. C. C. 78; *Operation Under Trackage Rights By Baltimore & Eastern Railroad Company*, 150 I. C. C. 377; *Unified Operation of Railroad Facilities at Los Angeles Harbor*, 150 I. C. C. 649, 660; *Operation and Abandonment By Chicago Great Western Railroad Company*, 150 I. C. C. 666.

trackage agreements. It is true that at the outset the Commission was somewhat doubtful of its jurisdiction in these cases. In four early cases,[5] three decided in 1921 and one in 1923, the Commission held, without discussion, that Section 1 (18) did not apply to trackage agreements, and in *Chesapeake & Ohio-Norfolk & Western Trackage Rights,* 72 I. C. C. 471, decided in 1922, the question whether the Commission had jurisdiction over trackage agreements was said to be an open question. In *Operation of Line by Illinois Central,* 72 I. C. C. 111, and in *Missouri-Kansas-Texas Reorganization,* 76 I. C. C. 84, both decided in 1922, the Commission issued certificates relating to trackage rights, but without discussion of the question of jurisdiction.

In *Operation of Line By Atchison, Topeka & Santa Fe Railway,* 94 I. C. C. 318, decided in 1924, a certificate was issued over the objection of the applicant that neither the letter nor the spirit of Section 1 (18) required it to secure a certificate to operate under trackage rights. In denying the motion of the applicant to dismiss on the ground of lack of jurisdiction, the Commission stated (p. 320) that the proposed operation was more than an operation under ordinary trackage rights,

[5] *In the Matter of the Application of The Texas, Oklahoma & Eastern Railroad Company,* 67 I. C. C. 484; *In the Matter of the Application of the Copper Range Railroad Company,* 67 I. C. C. 502; *The Cleveland Passenger Terminal Case,* 70 I. C. C. 659; *Operation of Sherman, Shreveport & Southern Railroad,* 76 I. C. C. 771.

being in the nature of a joint operating contract. If the fact is material, the trackage agreement here in question is even more in the nature of a joint operating contract than was the agreement in that case.

In all cases decided since the *Atchison, Topeka & Santa Fe case,* the Commission has held, without qualification, that it has jurisdiction over extensions, operations, or abandonments of operations under trackage rights (Footnote 4, *supra,* p. 18). Any doubt which may have existed due to the early decisions of the Commission has long since been dispelled by the uniform administrative construction during the past eight years. If the statute can be regarded as ambiguous, this long continued administrative construction should be persuasive. See *The New York Central Securities Corporation* v. *United States,* 287 U. S. 12, 24.

Appellants (brief, pp. 36, 37, 38) appear to rely upon the fact that in the past the State authorities have not generally objected to the exercise of jurisdiction by the Interstate Commerce Commission in these cases. But the failure of the States to object may reflect merely their acquiescense in the interpretation of the Act adopted by the Commission. Appellants' assertion (brief, p. 25) that the instant case is the first in which the Commission has sustained its own jurisdiction over active opposition is negatived by *Proposed Operation Under Trackage Rights of Northern Pacific Railway Company,* 111 I. C. C. 689, in which the Com-

mission sustained its jurisdiction over trackage rights under Section 1 (18) over the objection of two municipalities which intervened to object to its exercise of jurisdiction.

In *Chicago & Alton Railway Company* v. *Toledo, Peoria & Western Railway Company,* 146 I. C. C. 171, decided in 1928, where the question was presented whether the Commission may refuse to authorize the abandonment of operation under trackage rights after the expiration of the agreement creating those rights, the application of Section 1 (18) to trackage rights was fully considered. The Commission said in part (pp. 180–181):

> The public interest in transportation lies primarily in the operation of railroads rather than in the facilities themselves. Operation under lease may comprise the entire operation of a line or any portion of such operation, and the public interest therein is obvious, the extent varying with the circumstances. It could not be maintained that the word "operation" as here used must be construed to mean exclusive operation, since under such construction it would be possible for joint operators, without securing permission, severally to abandon operation and thus leave the public entirely without service. It is rather to be believed that the word "operation" as used in the statute, has reference to the movement of railroad equipment, through which alone the public is served, and that the word embraces partial operation as well as complete operation. We

> have never considered the precise question here presented but we have in many cases exercised jurisdiction over the commencement of joint operations under agreements similar to that here before us.[6]

Even if the application of Section 1 (18) to trackage rights be still regarded as an open question, it seems unreasonable to believe that Congress intended that extensions and abandonments by carriers of operations over tracks controlled by them should be subject to the approval of the Interstate Commerce Commission, but that extensions or abandonments of operations under trackage rights should be left to be regulated by the States. In *Texas & New Orleans Railroad Company* v. *Northside Belt Railway Company*, 276 U. S. 475, this Court said (p. 479):

> The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest.

If the Interstate Commerce Commission lacks jurisdiction over trackage rights, carriers are free to extend their operations by trackage agreements and to create competition in excess of that required in the public interest. Tracks authorized to be built to provide a particular service may be di-

[6] Here numerous cases are cited; see Footnote 4, *supra*, p. 18.

verted to an entirely different service without the power of the Interstate Commerce Commission to prevent it. The Commission would have no power to prevent the abandonment of operations under trackage rights where such operations are required in the public interest, and would lack power to authorize abandonment of such operations, over the objections of the States, where continued operations might, because of losses being sustained, endanger the ability of carriers to serve interstate commerce. The power to regulate trackage rights is, we submit, a necessary incident to the proper exercise of the affirmative duty imposed on the Interstate Commerce Commission by the Transportation Act to maintain an adequate railway service for the people of the United States. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company,* 257 U. S. 563, 585; *New England Divisions Case,* 261 U. S. 184, 189; *Texas and Pacific Railway Company* v. *Gulf, Colorado and Santa Fe Railway Company,* 270 U. S. 266, 277.

Appellants attempt to dispute the broad purposes ascribed by this Court to Section 1 (18) by referring (brief, pp. 29–33) to portions of the legislative debates which, they assert, leave no doubt that "the provision must be construed as applying only to construction." But while the legislative history referred to may reveal a dominant purpose to prevent wasteful construction, this obviously

was not the sole purpose for, in addition to construction, Section 1 (18) deals specifically with operation and abandonment. It appearing from the face of the statute that its purposes are obviously broader than those mentioned in the legislative debates referred to by appellants, those debates are not helpful in determining the scope of the legislative intent.

The arguments of appellants founded upon comparison of Section 1 (18) with other provisions of the Act are equally without force. It is said that under paragraph 21 of Section 1, providing for compulsory extensions of lines, one carrier could not be compelled to grant trackage rights over its tracks to another; that an extension under paragraph 21 must be the same as under paragraph 18; and that, therefore, there can be no extension within paragraph 18 by operation under trackage rights. But the fact that a particular form of extension may not be compelled is no reason why it should not be regulated if undertaken voluntarily. Thus, although a carrier probably could not be compelled under Section 1 (21) to lease its tracks to another, we think it not open to doubt that the acquisition by a carrier, by agreement, of the exclusive use of tracks adjoining its own, would effect an extension of its line within the meaning of Section 1 (18).

There is no warrant for the statement (brief, p. 20) that operations under trackage rights are

"as a matter of common knowledge" generally of slight extent and importance. One of the difficulties encountered by the court below with the construction contended for by appellants, was (R. 570) that it would "prevent national control of such important arteries of interstate commerce as are railroads using the tracks of other railroads engaged therein." Congress regarded the joint use of terminal tracks of such vital importance that it empowered the Interstate Commerce Commission under Section 3 (4) to compel terminal companies to share their tracks. That trackage rights may also be important apart from the joint use of terminal tracks is illustrated in *Chesapeake & Ohio-Norfolk & Western Trackage Rights,* 72 I. C. C. 471, *supra,* where the Commission found (p. 472) that certain trackage rights enjoyed by the Chesapeake & Ohio "form, to all intents and purposes, a part of" its main line and that their discontinuance would disrupt its entire system.

Finally, if appellants' position is sound, approval of the construction or abandonment of tracks must be sought from the Interstate Commerce Commission, and approval of the acquisition or abandonment of trackage rights must be obtained from State authorities, even though both may often form part of a single undertaking.

II

THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION UNDER SECTION 1 (18) OVER A TRACKAGE AGREEMENT IS EXCLUSIVE AND EXTENDS OVER ALL PROVISIONS THEREOF, INCLUDING THOSE FIXING THE RENTAL

In a proceeding under Section 1 (18), the Commission is not limited to consideration of the need for the particular transportation service involved. Equally important among the broad purposes of Section 1 (18) are the preservation of the earning capacity, and the conservation of the financial resources, of the carriers. *Texas & Pacific Railway Company* v. *Gulf, Colorado & Santa Fe Railway Company,* 270 U. S. 266, *supra; Colorado* v. *United States,* 271 U. S. 153; *Texas & New Orleans Railroad Company* v. *Northside Belt Railway Company,* 276 U. S. 475, *supra.* It would seem, therefore, that the Commission in this case was empowered to examine into the terms of the trackage agreement as well as into the character of the proposed operations, and, when it found that certain terms of the agreement were unfair to one of the carriers, to make its order conditional on their modification (*supra,* pp. 3, 9, 10). This authority would appear to have been specifically provided for in paragraph 20 of Section 1, which provides in part (*infra,* p. 36):

> The Commission shall have power to issue such certificate as prayed for, * * *

> and *may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.* From and after issuance of such certificate, and not before, the carrier by railroad may, *without securing approval other than such certificate,* comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby.

The provision authorizing the Commission to fix the "terms and conditions" on which its approval may be had, and the further express provision that no approval apart from the certificate of the Commission shall be required, show that no approval by a State is necessary.

Appellants' contention is (brief, pp. 50–57) that since the purpose of Section 1 (18) is to prevent interstate carriers from weakening themselves, the Interstate Commerce Commission is limited to considering whether the effect of a trackage agreement may be to weaken any of the carriers involved. The answer to this contention is found in the *Colorado case, supra,* and in *Transit Commission* v. *United States,* 284 U. S. 360. The *Colorado case* sustained the validity of an order of the Commission under Section 1 (18) authorizing the abandonment by an interstate carrier of a branch line

located within the State of Colorado. In rejecting a contention analogous to that made here, this Court said (pp. 167–168):

> While the constitutional basis of authority to issue the certificate of abandonment is the power of Congress to regulate interstate commerce, the Act does not make issuance of the certificate conditional upon a finding that continued operation will result in discrimination against interstate commerce, or that it will result in a denial of just compensation for the use in intrastate commerce of the property of the carrier within the State, or that it will result in a denial of such compensation for the property within the State used in commerce intrastate and interstate. *The sole test prescribed is that abandonment be consistent with public necessity and convenience.* In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. For it was a purpose of Transportation Act, 1920, to establish and maintain adequate service for both. (Italics ours.)

In the instant case, the Interstate Commerce Commission has plenary jurisdiction to determine whether the trackage agreement in question meets the test of public convenience and necessity. The local as well as the national interest is committed to its care. To insure due consideration of the local interests Section 1 (19) provides for notice to the State authorities and other interested persons, with

an opportunity to be heard. See *Colorado* v. *United States, supra,* at p. 167.

Appellants assert that the rental paid by the Long Island to the Pennsylvania affects directly the intrastate commutation fares of the Long Island and is, therefore, primarily of local concern. But the interstate rates of the Pennsylvania will likewise be affected if it is required to sustain more than its fair share of the costs of the jointly used facilities. As stated in the report of the Commission (R. 19):

> The Pennsylvania and the Long Island are entitled to equally fair terms in the matter.

In the *Transit Commission case, supra,* this Court held that the Interstate Commerce Commission had exclusive authority over the abandonment by the Long Island of its Whitestone branch, although the abandonment affected primarily intrastate commerce.

If, as we contend, the jurisdiction of the Interstate Commerce Commission is complete and exclusive, there can be no question of the validity of the conditions attached to its order. This case is unlike *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company,* 282 U. S. 311, where the condition of the Commission's order which was held invalid was found to affect the terms of a contract between private persons not parties to the proceeding before the Commission and involving a subject matter beyond the reach of the Federal power. The agreement in-

volved in the instant case is one between the carriers themselves, and its terms have a distinct bearing upon the issues before the Commission (*supra*, pp. 26–28).

III

THE INTERSTATE COMMERCE COMMISSION HAS JURISDICTION OVER A TRACKAGE AGREEMENT BETWEEN INTERSTATE CARRIERS ENTERED INTO SUBSEQUENT TO THE ENACTMENT OF THE TRANSPORTATION ACT, 1920, ALTHOUGH OPERATION OVER THE TRACKS IN QUESTION COMMENCED, UNDER AN EARLIER AGREEMENT, PRIOR TO THE PASSAGE OF THAT ACT

Appellants maintain (brief, pp. 39–49) that the Interstate Commerce Commission lacked jurisdiction over the trackage agreement in this case because the Long Island commenced to operate over the tracks here in question prior to the enactment of Section 1 (18). The agreement which was presented to the Interstate Commerce Commission for approval was dated November 13, 1928. (R. 576.) The previously existing contract between the carriers expired on December 31, 1925, and was extended for one year. (R. 17.) Desiring to enter into a more permanent arrangement, the carriers sought the authority of the Interstate Commerce Commission to enter into a 20-year agreement. (*Ibid.*) The Commission approved an agreement for 5 years. (*Supra*, p. 3.) The claim of appellants is that the carriers should have sought the approval of their trackage agreement from the Transit Commission.

The question thus presented is whether a trackage agreement between two interstate carriers

relating to the joint use of terminal facilities, entered into subsequent to the enactment of the Transportation Act, 1920, is subject to regulation by the State or by the Interstate Commerce Commission. It is our view that with the enactment of Section 1 (18) in the exercise of the paramount federal power over interstate commerce, all matters pertaining to extensions, operations, or abandonments by interstate carriers, apart from those enumerated in paragraph 22 of Section 1 (*infra*, p. 37), fell under the jurisdiction of the Interstate Commerce Commission, and that applicable State laws have been superseded. We submit that the present case is governed in this respect by *Alabama & Vicksburg Railway Company* v. *Jackson & Eastern Railway Company*, 271 U. S. 244, *supra*. There the Jackson & Eastern claimed the right under a State statute to construct a junction between its tracks and those of the Alabama & Vicksburg and to exercise the right of eminent domain for that purpose. In a suit brought to enjoin eminent domain proceedings commenced by the Jackson & Eastern, the Alabama & Vicksburg contended that the Interstate Commerce Commission, since the Transportation Act, had exclusive authority over physical connections between interstate railroads. The decision of the Supreme Court of Mississippi that Congress had failed to take full control of the subject and that the State statute remained in full force and effect, was reversed by this Court. Referring to the enactment of the Transportation Act, this Court said (p. 248):

> Since then the authority of the Interstate Commerce Commission has been greatly enlarged and the power of the States over interstate carriers correspondingly restricted. Prominent among the enlarged powers of the federal Commission is the control conferred over construction and equipment of railroads, over their use by other carriers and, generally, over the relation of carriers to one another. While none of the amendments in specific terms confers upon the Commission exclusive power over physical connections between railroads engaged in interstate commerce, it is clear that the comprehensive powers conferred extend to junctions between main lines like those here in question.

In the instant case the claim that a State commission has jurisdiction over a trackage agreement between interstate carriers entered into subsequent to the enactment of the Transportation Act, is inconsistent with the extensive control over interstate carriers conferred upon the Interstate Commerce Commission by that Act.

What has previously been said (*supra*, pp. 26–29) with reference to the scope of the authority of the Interstate Commerce Commission under Section 1 (18), negatives appellants' assertion (brief, p. 45) that "The thing assumed to be embraced by Section 1 (18) was operation, not written agreements." Since the jurisdiction of the Interstate Commerce Commission embraces the terms of the operating agreement as well as the operation itself,

it is submitted that the Commission's authority extends over an agreement executed since the passage of Section 1 (18).

Appellants rely upon the literal meaning of the words used in the statute, but the purpose of the Transportation Act to develop and maintain an adequate railway system for the United States requires a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of the words employed by Congress. *Piedmont and Northern Railway Company* v. *Interstate Commerce Commission,* 286 U. S. 299, 311. As the Court there indicated, the Transportation Act was remedial legislation and should, therefore, be given a liberal interpretation.

The facts in *Detroit Terminal Railroad Company* v. *Pennsylvania-Detroit Railroad Company,* 15 F. (2d) 507, are essentially different from those presented here. In that case, suit was brought under Section 1 (20) to enjoin construction of a line of railroad, the construction of which had not been approved by the Interstate Commerce Commission, but had been undertaken prior to the enactment of Section 1 (18). To have prevented the completion of the project would have materially impaired the value of track already laid at an expenditure of many millions of dollars. The court held that since the construction had been undertaken in good faith prior to the passage of the Transportation Act, and was substantially completed, a certificate under Section 1 (18) was not

required for its completion. The *Detroit Terminal case* might be applicable if the Commission were seeking to regulate the terms of an agreement entered into prior to the Act. It might then be argued that the Act should not be held to apply retroactively to rights and obligations created in good faith before it was passed. Here, however, the only rights and obligations affected by the Commission's order have come into being since the statute was enacted and are, therefore, subject to its terms.

CONCLUSION

It is respectfully submitted that the decree below should be affirmed.

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MARCH, 1933.

APPENDIX

The Interstate Commerce Act, as amended by the Transportation Act, 1920, provides in part:

> Section 1 (18). After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. (C. 91, 41 Stat. 477, U. S. C., Title 49, Sec. 1 (18).)
>
> (19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this

Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates. (C. 91, 41 Stat. 478; U. S. C., Title 49, Sec. 1 (19).)

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the

United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; * * * (C. 91, 41 Stat. 478; U. S. C., Title 49, Sec. 1 (20).)

* * * * *

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation. (C. 91, 41 Stat. 478; U. S. C., Title 49, Sec. 1 (22).)

* * * * *

Section 3 (4). If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. * * * (C. 91, 41 Stat. 479; U. S. C., Title 49, Sec. 3 (4).)

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